

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JEAN M. SINDT,)	
)	CASE NO. C13-0426-RSM-MAT
Plaintiff,)	
)	
v.)	REPORT AND RECOMMENDATION
)	RE: SOCIAL SECURITY DISABILITY
CAROLYN W. COLVIN, Acting)	APPEAL
Commissioner of Social Security,)	
)	
Defendant.)	

Plaintiff Jean M. Sindt proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's applications for Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court recommends that this matter be REVERSED and REMANDED for further proceedings.

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FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1969.¹ She graduated from high school and previously worked as a waitress, sales clerk, and nurse assistant. (AR 28.)

Plaintiff filed an application for DIB on December 14, 2010 and for SSI on November 25, 2011, alleging disability beginning May 9, 2009. Her applications were denied at the initial level and on reconsideration.

On January 13, 2012, ALJ Verrell Dethloff held a hearing, taking testimony from plaintiff. (AR 37-51.) On February 9, 2012, the ALJ issued a decision finding plaintiff not disabled. (AR 9-32.)

Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review on January 12, 2013 (AR 1-3), making the ALJ's decision the final decision of the Commissioner. Plaintiff appealed this final decision of the Commissioner to this Court.

JURISDICTION

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not engaged in substantial gainful activity since the alleged onset date. At step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ found severe

¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 plaintiff's disorder of the back—discogenic and degenerative, affective disorder, anxiety
02 disorder, and substance abuse disorder. Step three asks whether a claimant's impairments
03 meet or equal a listed impairment. The ALJ found plaintiff's impairments did not meet or
04 equal the criteria of a listed impairment.

05 If a claimant's impairments do not meet or equal a listing, the Commissioner must
06 assess residual functional capacity (RFC) and determine at step four whether the claimant
07 demonstrated an inability to perform past relevant work. From a physical standpoint, the ALJ
08 found plaintiff able to perform "essentially the full range of light work as defined in 20 C.F.R.
09 §§ 404.1567(b) and 416.967(b)" (AR 15). Plaintiff is able to lift and/or carry twenty pounds
10 occasionally and ten pounds frequently. She can stand and/or walk about six hours in an
11 eight-hour day, and sit for about six hours in an eight-hour day, with normal breaks. Plaintiff
12 can balance, kneel, and climb ramps and stairs frequently. She can stoop, crouch, crawl, and
13 climb ladders, ropes or scaffolds occasionally. Plaintiff is limited to occasional overhead
14 reaching with both upper extremities and must avoid concentrated exposure to extreme cold,
15 vibration, and hazards.

16 From a mental health/emotional standpoint, plaintiff is able to understand, remember,
17 and carry out simple instructions. She is able to make simple work-related decisions and
18 persist adequately through a normal workweek. Plaintiff is able to ask simple work-related
19 questions and request assistance, but should perform work which is not collaborative in nature
20 and does not involve close frequent interaction with the public, but may involve occasional
21 superficial interaction with the public. The ALJ concluded that, with these mental limitations,
22 plaintiff retains the capacity to perform unskilled work. (AR 30.)

01 With this assessment, the ALJ found plaintiff unable to perform her past relevant work.
02 Therefore, the ALJ proceeded to step five of the sequential evaluation, where the burden shifts
03 to the Commissioner to demonstrate the claimant retains the capacity to make an adjustment to
04 work that exists in significant levels in the national economy. Using the Medical-Vocational
05 Guidelines as a framework in conjunction with the plaintiff's RFC, age, education, and work
06 experience, the ALJ found plaintiff to retain the capacity to perform light as well as sedentary
07 unskilled work and, therefore, not disabled.

08 This Court's review of the ALJ's decision is limited to whether the decision is in
09 accordance with the law and the findings supported by substantial evidence in the record as a
10 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means
11 more than a scintilla, but less than a preponderance; it means such relevant evidence as a
12 reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881
13 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which
14 supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278
15 F.3d 947, 954 (9th Cir. 2002).

16 Plaintiff argues the ALJ erred by failing to identify borderline personality disorder as a
17 step two severe impairment, failed to give sufficient reasons for finding her subjective
18 testimony not credible, erred in assessing her RFC, and erroneously relied on the
19 Medical-Vocational Guidelines at step five. She asks that the ALJ's decision be reversed and
20 her claim remanded for additional proceedings, with the opportunity to present relevant new
21 evidence. The Commissioner argues the ALJ's decision is supported by substantial evidence
22 and should be affirmed.

Step Two

At step two, a claimant must make a threshold showing that her medically determinable impairments significantly limit her ability to perform basic work activities. *See Bowen v. Yuckert*, 482 U.S. 137, 145 (1987) and 20 C.F.R. §§ 404.1520(c), 416.920(c). “Basic work activities” refers to “the abilities and aptitudes necessary to do most jobs.” 20 C.F.R. §§ 404.1521(b), 416.921(b). “An impairment or combination of impairments can be found ‘not severe’ only if the evidence establishes a slight abnormality that has ‘no more than a minimal effect on an individual’s ability to work.’” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996 (quoting SSR 85-28). “[T]he step two inquiry is a de minimis screening device to dispose of groundless claims.” *Id.* (citing *Bowen*, 482 U.S. at 153-54). An ALJ is also required to consider the “combined effect” of an individual’s impairments in considering severity. *Id.*

A step two severe mental or physical impairment must result from anatomical, physiological, or psychological abnormalities which can be shown by medically acceptable clinical and laboratory diagnostic techniques, and established by medical evidence consisting of signs, symptoms, and laboratory findings, not only by the claimant’s statement of symptoms. 20 C.F.R. §§ 404.1508, 416.908. “Symptoms” are the claimant’s own description of his or her physical or mental impairment. *Id.* at 404.1528(a), 414.928(a). “Signs” are “anatomical, physiological, or psychological abnormalities which can be observed, apart from the claimant’s statements (symptoms).” *Id.* at 404.1528(b), 414.928(b). “Signs must be shown by medically acceptable clinical diagnostic techniques.” *Id.* “Psychiatric signs are medically demonstrable phenomena that indicate specific psychological abnormalities, e.g., abnormalities

01 of behavior, mood, thought, memory, orientation, development, or perception[.]” and “must
02 also be shown by observable facts that can be medically described and evaluated. *Id.*
03 “Laboratory findings” are “anatomical, physiological, or psychological phenomena which can
04 be shown by the use of medically acceptable laboratory diagnostic techniques.” *Id.* at
05 404.1528(c), 414.928(c). Some of these diagnostic techniques include chemical tests, studies
06 such as electrocardiograms or x-rays, and psychological tests. *Id.*

07 Plaintiff contends the ALJ erred by failing to find personality disorder to be a severe
08 impairment. While the ALJ did consider this disorder at step two, acknowledging two
09 examiners diagnosed the condition, he concluded “[t]hese references to personality disorder are
10 contained in evaluations that do not include diagnostic criteria to establish a personality
11 disorder”, citing “Diagnostic and Statistical Manual of Mental Disorders, p. 630 (4th ed.)
12 (DSM-IV). Plaintiff contends the ALJ mistakenly references the diagnostic criteria for
13 parasomnias (abnormal behavioral events occurring in association with sleep), rather than
14 personality disorders. However, the edition of the DSM cited by the ALJ does set forth the
15 diagnostic criteria for personality disorders at page 630. *See* DSM-IV at 630.

16 The Court does, however, find the ALJ’s reasoning to lack clarity. If the ALJ found the
17 reports from Dr. Carstens and Dr. Cunningham insufficiently specific with regard to
18 explanation of their diagnosis of personality disorder, the ALJ’s affirmative duty to fully and
19 fairly develop the record should have triggered additional inquiry from those medical sources.
20 20 C.F.R. §§ 404.1512(e), 416.912(e). *See also* *Widmark v. Barnett*, 454 F.3d 1063, 1068 (9th
21 Cir. 2006) (“[T]he ALJ should not be ‘a mere umpire’ during disability proceedings. Rather, the
22 ALJ has ‘a special duty to fully and fairly develop the record and to assure that the claimant’s

01 interests are considered.’’’) (quoted sources omitted).

02 On the other hand, if the ALJ meant to indicate his review of Dr. Carstens’ and Dr.
03 Cunningham’s findings showed the diagnostic criteria for personality disorder were absent
04 from the record, the ALJ should explain that analysis in the decision. *Lewin v. Schweiker*, 654
05 F.2d 631, 634, n.7 (9th Cir. 1981) (“Secretary has obligation both to claimants and to reviewing
06 courts to make full and detailed findings in support of his ultimate conclusion”) (citing *Small v.*
07 *Califano*, 565 F.2d 797, 801 (1st Cir. 1977).) Analyzing the diagnostic criteria for Borderline
08 Personality Disorder, plaintiff presents a plausible argument that the record contains sufficient
09 evidence of the diagnostic criteria personality disorder to pass the step two de minimis
10 threshold. (Dkt. 12 at 4, n. 2.) Plaintiff argues the ALJ’s step two error was not harmless,
11 because it precluded a legally sufficient evaluation of her impairments in combination.
12 Further, plaintiff argues proper consideration of her personality disorder would have shed light
13 on certain behaviors and characteristics the ALJ considered in conducting the credibility
14 analysis.

15 The Commissioner responds primarily with a lengthy recitation of the medical
16 evidence, without providing any pertinent argument. (Dkt. 18 at 3-16.) None of the points
17 were cited by the ALJ in making the step two determination with regard to plaintiff’s
18 personality disorder. The Court reviews the ALJ’s decision “based on the reasoning and
19 factual findings offered by the ALJ—not post hoc rationalizations that attempt to intuit what the
20 adjudicator may have been thinking.” *Bray v. Comm’r of SSA*, 554 F.3d 1219, 1225 (9th Cir.
21 2009) (citing, *inter alia*, *Snell v. Apfel*, 177 F.3d 128, 134 (2d Cir. 1999) (“The requirement of
22 reason-giving exists, in part, to let claimants understand the disposition of their cases...’’’)).

01 The Court finds it necessary to remand this matter for further consideration of plaintiff's
02 personality disorder at step two. If necessary, the ALJ should re-contact Dr. Carstens and Dr.
03 Cunningham to clarify the basis for their diagnosis. If the ALJ finds plaintiff's personality
04 disorder severe at step two, the ALJ should proceed through the remaining steps of the
05 sequential evaluation process, including a reassessment of plaintiff's credibility as described
06 below.

07 The Court declines to address plaintiff's argument that the ALJ's criticism of Dr.
08 Carsten's opinions as reliant solely on plaintiff's self-report questionnaire. Remand of this
09 matter will allow further development and clarification of the basis for Dr. Carsten's opinions.

10 Credibility Analysis

11 Absent evidence of malingering, an ALJ must provide clear and convincing reasons to
12 reject a claimant's testimony. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007).
13 "In weighing a claimant's credibility, the ALJ may consider his reputation for truthfulness,
14 inconsistencies either in his testimony or between his testimony and his conduct, his daily
15 activities, his work record, and testimony from physicians and third parties concerning the
16 nature, severity, and effect of the symptoms of which he complains." *Light v. Comm'r of*
17 *Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

18 Here, the ALJ found plaintiff to be not "notably credible":

19 She has significant motivational issues, has not sought or accepted significant
20 treatment for her mental impairments, and what she has had may be tied to her
21 drug seeking behavior; she has had documented drug seeking behavior, for
22 physical impairment which has only required conservative treatment; she has a
poor work record, and on occasion demonstrated a bad attitude not necessarily
rising to the level of pathology.

01 (AR 18.) Plaintiff argues these reasons are not clear and convincing.

02 A. Failure to Seek Treatment.

03 An ALJ appropriately considers an unexplained or inadequately explained failure to
04 seek treatment or follow a prescribed course of treatment. *Tommasetti v. Astrue*, 533 F.3d
05 1035, 1039 (9th Cir. 2008) (ALJ permissibly inferred that the claimant's pain was not as
06 disabling as alleged "in light of the fact that he did not seek an aggressive treatment program
07 and did not seek an alternative or more-tailored treatment program after he stopped taking an
08 effective medication due to mild side effects.") However, it may be problematic to draw an
09 adverse inference from a failure to seek mental health treatment. *See, e.g., Regennitter v.*
10 *Comm'r Soc. Sec. Admin.*, 166 F.3d 1294, 1299-1300 (9th Cir. 1999) ("[W]e have particularly
11 criticized the use of a lack of treatment to reject mental complaints both because mental illness
12 is notoriously underreported and because 'it is a questionable practice to chastise one with a
13 mental impairment for the exercise of poor judgment in seeking rehabilitation.'" (quoting
14 *Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996)). Here, the record shows, and the
15 Commissioner concedes, plaintiff had problems with her medical coverage for mental health
16 treatment. (AR 216, 497.) *See* Social Security Ruling 82-59 (failure to follow prescribed
17 treatment may be justifiable where claimant unable to afford); SSR 96-7p (ALJ should not draw
18 inferences from failure to seek or pursue treatment without first considering explanations for
19 that failure, including an inability to afford treatment). The Court, therefore, finds plaintiff's
20 failure to pursue mental health treatment not a clear and convincing reason to find her not
21 credible.

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01 B. Drug-Seeking Behavior

02 It may be appropriate for an ALJ to consider evidence of drug-seeking behavior as
03 evidence a claimant may be exaggerating his or her complaints of pain in order in order to
04 obtain narcotic pain medication. *See, e.g., Edlund v. Massanari*, 253 F.3d 1152, 1157 (9th Cir.
05 2001), *amended opinion* at 2001 U.S. App. LEXIS 17960 (Aug. 9, 2001) (ALJ properly
06 considered evidence of exaggeration of pain to receive pain medication in credibility
07 assessment). In this case, plaintiff concedes the evidence suggests she engaged in
08 drug-seeking behavior, but contends the behavior was prompted by real pain. The
09 Commissioner does not provide a substantive response. (Dkt. 18 at 18.)

10 The Court finds the ALJ appropriately considered evidence of drug-seeking behavior in
11 the medical records to find plaintiff's pain complaints less than credible. (*See, e.g.,* AR 317
12 (citing narcotic-seeking behavior); AR 309, 327 (plaintiff found to have violated her pain
13 contract); AR 563 (plaintiff "very upset about the fact she [was] not getting opiates").) Less
14 persuasive, however, is the ALJ's finding that, to the extent plaintiff has sought or accepted
15 mental health treatment, it "may be tied to her drug seeking behavior[.]" (AR 18.) There is
16 no indication in the record plaintiff was given access to narcotics as a component of her mental
17 health treatment. To the extent the ALJ's credibility analysis rests on this reason, the Court
18 finds it neither clear nor convincing.

19 C. Objective Evidence of Panic Attacks and Mental Status Examination Findings

20 The ALJ found plaintiff's allegations of significantly limiting mental health symptoms
21 inconsistent with the objective medical evidence. Plaintiff argues two of the examples cited by
22 the ALJ in this regard do not stand up to scrutiny. First, plaintiff disputes the ALJ's finding

01 that, “[w]hile the claimant alleges frequent and recurring panic attacks, her objective medical
02 records are inconsistent with this allegation”, pointing to records at the Community Health
03 Center that show no report of a panic attack for a nine month period. (AR 18-19, 564.)
04 Plaintiff cites multiple references in the Community Health Center records noting anxiety
05 complaints, post-traumatic symptoms, and assessing a generalized anxiety disorder, suggesting
06 plaintiff’s use of the term “panic attack” is more consistent with generalized anxiety.

07 Plaintiff also argues substantial evidence does not support the ALJ’s characterization of
08 her mental status exam findings as “normal” (AR 18), citing findings to the contrary, such as
09 suicidal ideation, constructed affect, depressed mood, impaired recent recall, anxious mood,
10 and other abnormal mental status findings. (AR 241, 474, 498, 574-77.) The Commissioner
11 again provides no substantive response to plaintiff’s arguments, and plaintiff does not assign
12 error to the other reasons cited by the ALJ regarding inconsistencies in the objective medical
13 evidence. (AR 18.) The Court agrees with plaintiff that the two reasons challenged by
14 plaintiff are not supported by substantial evidence.

15 D. Conservative Treatment

16 The ALJ cited the “limited and conservative treatment” for plaintiff’s back problems as
17 contradictory of her allegations of significantly limiting pain, correctly noting that conservative
18 treatment is one indicator of a lack of credibility of allegedly disabling impairment. *See Parra*
19 *v. Astrue*, 481 F.3d 742, 750-51 (9th Cir. 2007) (stating that “evidence of ‘conservative
20 treatment’ is sufficient to discount a claimant’s testimony regarding severity of an
21 impairment”); *see also Meanel v. Apfel*, 172 F.3d 1111, 1114 (9th Cir. 1999) (rejecting
22 subjective pain complaints where petitioner’s “claim that she experienced pain approaching the

01 highest level imaginable was inconsistent with the ‘minimal, conservative treatment’ that she
02 received”). Plaintiff does not dispute the concept, but argues it has been misapplied in her
03 case. She notes that her back condition has not been limited to “conservative” treatment, such
04 as over-the-counter medications, but has included both narcotic and non-narcotic prescribed
05 pain medication and prescription anti-inflammatories, steroid injections, and a referral for
06 neurosurgical evaluation and a pain management clinic. She notes that the ALJ fails to
07 mention the assessments and treatment by Dr. Balkany at the pain management center,
08 conducted as part of a “Pre-Operative History and Physical Examination.” (AR 504-10.)

09 The Commissioner makes no substantive response to this assignment of error. The
10 Court finds the ALJ’s reliance on a lack of conservative treatment to assess plaintiff’s
11 credibility to lack substantial evidence.

12 E. Credibility Issues Relating to Personality Disorder

13 The ALJ cites plaintiff’s “poor work record” and “minimal work history” as evidence of
14 a lack of commitment and an indication plaintiff “is acclimated to living at a low income level”
15 and lacks motivation. (AR 18, 22.) Plaintiff agrees her work history is fairly spotty, but
16 argues this is consistent with the impact of her personality disorder on her ability to keep a job.
17 Again, the Commissioner fails to provide a substantive response. (Dkt. 18 at 18.)

18 The Commissioner further makes no response to plaintiff’s argument that the ALJ’s
19 reliance on an alleged inconsistency between plaintiff’s subjective symptoms and her activities
20 of daily living lacks substantial evidence. In particular, plaintiff reasonably argues it was
21 more likely she told her treatment provider that she could lift “4-5” pounds, rather than “45”
22 pounds. (AR 21 (citing AR 558).)

01 The Court agrees a reassessment of plaintiff's personality disorder at step two may
02 impact the nature of the ALJ's consideration of plaintiff's low earnings history and frequent job
03 changes (including her last employment in May 2009), as well as her activities of daily living.
04 Accordingly, on remand, the ALJ should reconsider this basis for evaluating plaintiff's
05 credibility.

06 Reliance on Medical-Vocational Guidelines

07 The Medical-Vocational Guidelines or "grids" present a short-hand method for
08 determining the availability and numbers of suitable jobs for claimants, addressing factors
09 relevant to a claimant's ability to work, such as age, education, and work experience. *See* 20
10 C.F.R. Pt. 404, Subpt. P, App 2. Their purpose is to streamline the administrative process and
11 encourage uniform treatment of claims. *Tackett v. Apfel*, 180 F.3d 1094, 1101 (9th Cir. 1999).
12 An ALJ may rely on the grids to meet his burden at step five. *Burkhart v. Bowen*, 856 F.2d
13 1335, 1340 (9th Cir. 1988). "They may be used, however, 'only when the grids accurately and
14 completely describe the claimant's abilities and limitations.'" *Id.* (quoting *Jones v. Heckler*,
15 760 F.2d 993, 998 (9th Cir. 1985)).

16 Here, the ALJ relied on the grids to find plaintiff "not disabled" at step five, finding that
17 her non-exertional limitations do not significantly erode the universe of work available to her.
18 (AR 28-30.) Because plaintiff's RFC may be impacted by the reconsideration of her
19 personality disorder at step two, as well as the re-evaluation of the credibility of her subjective
20 testimony, the ALJ should reconsider the step-five finding on remand.

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CONCLUSION

For the reasons set forth above, the Court recommends this matter should be REVERSED and REMANDED for further proceedings.

DATED this 27th day of September, 2013.

A handwritten signature in black ink, appearing to read 'Mary Alice Theiler', written over a horizontal line.

Mary Alice Theiler
Chief United States Magistrate Judge